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In The

Supreme Court of the United States

October Term, 1997

EARL W. KAVANAU,

Petitioner,

vs.

SANTA MONICA RENT CONTROL BOARD, AN AGENCY OF THE CITY OF SANTA MONICA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of California

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S RESTATEMENT OF THE QUESTION PRESENTED

1. Whether a party in a ratemaking proceeding who brought a combined due process and takings case in State court, and who lost the takings issue and won the due process issue, can thereafter maintain an action for inverse condemnation based solely on the due process violation.

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JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

STATEMENT OF THE CASE

Respondent Santa Monica Rent Control Board respectfully submits that the published opinion of the Supreme Court of California contains an accurate description of the proceedings below. Pet. App. at A-2 – A-6.[1] Petitioner's statement of the case is misleading and inaccurate in a number of respects.

The California Supreme Court determined in this case that 12% rent increases for each of eight successive years were not so low as to constitute a taking of Petitioner's property. *Id.* at A-1 – A-2. It also held that a due process violation had been cured by Respondent and, because of its insignificant economic impact, did not result in a taking.

Petitioner does not challenge the holding of the California Supreme Court that no taking occurred under this Court's existing standards. Instead, he asserts a new theory: that a due process violation necessarily is also a violation of the Takings Clause. Thus, under Petitioner's theory, errors in a rate order, even if cured upon routine review, constitute a temporary taking.

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[1] The Petition for Certiorari is cited as "Pet. ___." The Appendices to the Petition are cited as "Pet. App. ___." The Appendix to this Brief in Opposition to the Petition for Certiorari is cited as "App. ___."

Petitioner purchased apartment buildings in Santa Monica, California, in 1988, nine years after the city adopted rent control. Shortly after purchase, Petitioner sought substantial rent increases from Respondent and challenged an existing regulation that limited rent increases to 12% per year.[2] His first challenge was rejected by the California Court of Appeal, which ruled that the regulation was constitutional.[3]

In a separate case involving the instant property, Petitioner again challenged the 12% limitation. He alleged in his complaint that Respondent's application of the limitation "constitutes a taking of Petitioner's property without just compensation, and denies Petitioner due process under the California and United States Constitutions." App. at 4. The trial court denied relief on both claims. On appeal, the Court of Appeal reversed on the due process claim. Pet. App. at E-1 ("*Kavanau I*"). The sole remedy awarded by the Court of Appeal was mandamus ordering a rent increase. *Id.* at E-6. Although Petitioner also sought lost interim rents, App. at 4, ¶ 1.(1), that remedy was not awarded. The California Supreme Court denied review, and certiorari was not sought in this Court.[4]

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[2] Former Santa Monica Rent Control Board Regulation 4107(a) (amended 1994).

[3] The California Supreme Court denied review of the case and ordered that the decision not be published in the official reports. *See Kavanau v. Santa Monica*, 233 Cal.App.3d 1060 (1991).

[4] The regulation challenged in *Kavanau I* has been amended. Pet. App. at A-6. There is no longer an automatic limit on rent increases. Should a tenant request a rent increase limit

Subsequently, Petitioner filed the present case ("*Kavanau II*") for inverse condemnation and damages. He alleged that *Kavanau I* had established a temporary taking for which he was entitled to further relief. His claims were based on the Takings Clause, on 42 U.S.C. § 1983, and on Article I, Section 19 of the California Constitution. Only the first claim survives in this Court.[5]

All three courts below in this case held that just compensation was not available because Petitioner had not suffered a taking. Pet. App. at A-15, B-9, D-2. The California Supreme Court specifically concluded that the court in *Kavanau I* did not find a taking. Pet. App. at A-15, A-25.[6] And for that reason, Petitioner failed to state a claim for inverse condemnation in this case. Whether damages were independently available for the due process violation was not a question before the California Supreme Court, for Petitioner had abandoned his § 1983 claim. *Id.* at A-17.

Petitioner now alleges that the prior adjudication (in *Kavanau I*) of a due process violation conclusively demonstrated that a taking had occurred. Thus, according to Petitioner, he is entitled to just compensation irrespective

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based on his or her economic situation, the Board must consider the economic effect on the landlord of limiting an otherwise permissible rent increase. In addition, California law has changed so as to allow additional rent increases in all California cities beginning January 1, 1999. *Id.* at A-22.

[5] Petitioner abandoned his § 1983 claim, Pet. App. at A-3, A-17, and his state claim is not reviewable on certiorari.

[6] Petitioner is barred from rearguing that *Kavanau I* found a taking; the California Supreme Court's conclusion that it did not is binding. *See Tibbs v. Florida*, 457 U.S. 31, 46-47 (1982).

of whether the traditional standards under the Takings Clause are satisfied.

REASONS FOR DENYING THE WRIT

The Petition for Certiorari misstates the issue before this Court. It is not whether just compensation is available in California courts for temporary takings of property. Indeed, the California Supreme Court's opinion reaffirms that such damages are available. Rather, the issue is whether just compensation is required even when no taking occurs. The California Supreme Court determined that Petitioner's property did not suffer a taking under any applicable test. It held that no categorical taking occurred, *i.e.*, that Petitioner had not been deprived of "all economically beneficial or productive use of land." Pet. App. A-10 – A-11 (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992), and *Agins v. City of Tiburon*, 447 U.S. 255 (1980)). The court also held that no other formulation used by this Court established a taking. Pet. App. at A-11 – A-13, A-15 – A-19. Petitioner does not challenge those rulings here.

Instead, Petitioner claims that a Fifth Amendment taking occurred because he had been denied due process under the Fourteenth Amendment. According to Petitioner, a "taking of property" necessarily occurs

whenever a rate-setting agency violates due process.[7] As such, any substantive or procedural due process violation affecting property triggers the Fifth Amendment's self-executing remedy of just compensation. It was the California Supreme Court's refusal to adopt this unification of the takings and due process clauses, *id.* at A-20, that Petitioner assigns as error requiring review by this Court.

Petitioner also claims a conflict between the decision below and Ninth Circuit cases preferring the Takings Clause over due process in land use cases. No such conflict exists. Any infirmity in the use of the due process clause for review of the underlying rate order, rather than the Takings Clause, is a problem of Petitioner's own making. He prevailed in *Kavanau I* under a due process theory, and, having allowed that case to become final, cannot now be heard to complain that it should have been treated as a takings case. *Kavanau I* is *res judicata* and not subject to review or correction in this case.

The courts below found that no taking had occurred, either temporary or permanent. Accordingly, Petitioner's claim that California courts deny compensation for temporary takings is not properly before this Court. Nor is Petitioner's second issue – whether the Takings Clause protects property acquired with knowledge of regulatory limitations. That issue too is manufactured. There is nothing in the decision below to suggest that Petitioner's

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[7] As put by the court below, "Kavanau asks us to consider whether a rent regulation that violates a particular property owner's right to due process by depriving him of a fair return also necessarily constitutes a taking." Pet. App. at A-19.

property is not fully protected by the Fifth and Fourteenth Amendments.

A. Whether a Taking Can Be Proven Merely By Showing a Due Process Violation Is Not a Question Requiring Resolution In This Case

The only question arguably presented in this case is whether a taking can occur solely by virtue of a due process violation in a rate order. The California Supreme Court held that even if the general premise were accepted – that a due process violation could also constitute a taking – a taking did not occur in this case. The court reached that conclusion by applying standard takings doctrine, focusing on the character and economic impact of the challenged regulation. Pet. App. at A-11. The court found that any infirmity in the rate order was insubstantial, and far short of a taking. *Id.* at A-15 – A-16.[8]

The court declined Petitioner's invitation to merge the due process and takings clauses. It noted that the clauses are distinct and protect economic interests in different ways. *Id.* at A-6. In doing so, the court carefully followed this Court's decisions. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825, 835, n.3 (1987) ("there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation

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[8] The court also had "serious doubts" that a due process violation had in fact occurred, suggesting that the Court of Appeal in *Kavanau I* had misapplied this Court's recent cases concerning review of rate orders. Pet. App. at A-15 – A-16.

of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical"); *see also Yee v. City of Escondido*, 503 U.S. 519, 532-37 (1992) (distinguishing between takings and due process claims); *Pennell v. City of San Jose*, 485 U.S. 1, 10 (1988) (same).

In order to establish a taking, and thus entitlement to just compensation, a property owner must show either an invasion of his land, *Yee*, 503 U.S. at 527, or that a regulation fails to "substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins*, 447 U.S. at 260. None of these factors were found in either *Kavanau I* or this case. Nor does Petitioner now claim that they were or could be established based on these facts.[9]

Rather, the court in *Kavanau I* found a due process violation because the 12% annual limit in former Regulation 4107 precluded Respondent from duly considering Petitioner's interests. Pet. App. at E-5 – E-6. The purpose of the limitation was to protect renters from excessive rent increases; a purpose approved by this Court in *Pennell*, 485 U.S. at 10-11. Yet, due process requires that the agency also consider landlord interests in setting rents, *id.* at 13-14, which could not be done with an absolute ceiling on rent increases.

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[9] It bears repeating that Petitioner has apparently misread the decision of the California Supreme Court. He asserts that the court held damages were unavailable for a temporary regulatory taking. Pet. at 11. Instead, the court held that no temporary taking had occurred, and for that reason "just compensation" could not be awarded. Pet. App. at A-14 – A-15.

However, it is a far stretch to transmute this due process violation into a taking. Even in rate cases invoking both the due process and takings clauses, this Court has been careful to specify the requirements for a taking. It is the economic "impact of the rate order which counts." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989) (quoting *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944)). Yet, that issue is conspicuously absent from the petition, and for good reason. The decisions below finding an insignificant economic impact on Petitioner are unassailable.

This is not to suggest that a due process violation can never be a violation of the Takings Clause as well. Yet, the clauses are neither equivalent nor fungible. Because the constitutional standards and the constitutional remedies are different, Petitioner must separately prove his entitlement to just compensation. Infirmities in rate setting, in and of themselves, do not cause a taking. *Duquesne Light Co.*, 488 U.S. at 310.

That is especially true here, where any deficiency in rents, even if it violated due process, was remedied long before it could mature into a taking. Pet. App. at A-20. In response to *Kavanau I*, Respondent granted Petitioner an immediate 80% rent increase, even though all due process required was that the agency set aside its earlier decision and re-hear Petitioner's case without regard to the 12% annual limit. *Id.* at A-23, E-6. In addition, Petitioner was, and remains, entitled to further administrative relief in

the event he suffers operating losses, including those from alleged delay in the prior rent increase.[10]

It is this last point that Petitioner emphasizes and confuses in his petition. He claims that the California Supreme Court has established a new rule – that damages are no longer available for a taking; instead, "just compensation" is limited to future rent increases. Pet. at 11. But the court nowhere said that. It did not flout *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), and hold that damages are unrecoverable for a taking. Rather, the court held that no taking had occurred. Pet. App. at A-20 (rent increases already received, and others Petitioner may obtain, "obviate[ ] a finding of a taking").

The California Supreme Court simply applied the standard rule that temporary operating losses, even those caused by regulatory delay, are not a taking unless they cause economic hardship. *Id.* at A-20 – A-21. Those losses must be so significant in magnitude and duration as to deny a business the ability to "operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risk." *Duquesne Light Co.*, 488 U.S. at 310 (quoting *Hope*, 320 U.S. at 605). Petitioner did not even attempt to show a taking by these standards. Thus, he was not entitled to any recovery for "inverse condemnation." The California Supreme Court got the analysis precisely right.

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[10] To the extent Petitioner claims that future administrative relief will be inadequate, his case is not ripe for review at this time. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

This Court has never adopted Petitioner's argument – that due process is but a subset of the Takings Clause. To do so would mean that in the rate regulation context a regulated business never has to satisfy the test of *Duquesne Light Co.* that rates must be so low as to "jeopardize the financial integrity of the compan[y] . . . [or] inadequate to compensate" for risk. 488 U.S. at 312. Instead, all it need establish is some procedural infirmity in the rate-setting process, and it is automatically entitled to "just compensation." Not only does this theory neatly dispense with the need for congressional damage remedies (for example, 42 U.S.C. § 1983), it also directly undermines this Court's efforts to distinguish takings and due process claims, particularly in the context of rent control. *See Yee*, 505 U.S. at 532-37; *Pennell*, 485 U.S. at 8-14.

B. There Is No Conflict Between the Decision Below and Decisions of The Ninth Circuit

Petitioner struggles to manufacture a conflict between the decision below and Ninth Circuit cases. He argues that the decision below denies state court plaintiffs protection under the Takings Clause as long as a due process remedy exists, while the Ninth Circuit, favoring the more explicit Takings Clause, "will not entertain a due process claim." Pet. at 6. Thus, Petitioner posits a "deadly contradiction" where choice of forum in California dictates the constitutional cause of action that must be alleged for regulatory takings. *Id.*

Petitioner's flawed premise is that the California Supreme Court has prevented plaintiffs from litigating

claims under the Takings Clause and obtaining just compensation. Indeed, the decision below notes that California law provides two different opportunities to allege a taking: concurrent with, or subsequent to, review of the rate order. Pet. App. at A-17. Petitioner elected the former, but did not prevail. The court below merely held that, under the facts of this case, none of the well-established tests for a Fifth Amendment taking were met, and that a due process violation does not by itself constitute a taking. That determination is unexceptional, and erects no barriers to just compensation.

Petitioner implies that meritorious regulatory takings challenges are at risk in California courts because they can be "recharacterized as a due process violation." Pet. at 12. Yet this case provides no basis for such an assertion, for no "recharacterization" occurred here. In *Kavanau I*, Petitioner brought both a takings and due process claim, but succeeded solely on due process grounds. It is Petitioner who seeks to recharacterize that result in order to obtain a takings remedy. In rejecting this novel theory, the decision below did not vitiate or alter the right to just compensation for plaintiffs who satisfy applicable takings standards. Petitioner's apparent frustration that his due process violation was cured by a procedural remedy rather than through monetary compensation is misdirected given that he waived his § 1983 claim, the appropriate vehicle for any monetary award.

Petitioner's citation to Ninth Circuit case law also misses the mark. It is true that the Ninth Circuit has held that the "explicit textual source of constitutional protection," like the Takings Clause, "preempts a more generalized substantive due process claim" brought under the

Fourteenth Amendment. *Armendariz v. Penman*, 75 F.3d 1311, 1321-22 (9th Cir. 1996) (citation and internal quotation marks omitted). However, none of the three Ninth Circuit cases cited by Petitioner (nor any other) held or even suggested that a due process remedy is not available in ratemaking cases. *See Armendariz*, 75 F.3d at 1325-26 (holding that constitutional protection against takings for private use grounded solely in the Takings Clause); *Patel v. Penman*, 103 F.3d 868 (9th Cir. 1996) (same), *cert. denied*, ___ U.S. ___, 117 S. Ct. 1845 (1997); *Macri v. King County*, 110 F.3d 1496, 1500 (9th Cir. 1997) (holding that constitutional protection against land use restrictions that do not "substantially advance legitimate state interests" grounded solely in Taking Clause). Thus, the alleged conflict is illusory.

C. The Decision Below Does Not Deny Fifth Amendment Protection to Owners Who Acquire Regulated Property

The last question presented by the petition is whether a property owner "forfeits his Fifth Amendment rights" to just compensation if his property is taken by a law enacted prior to purchase. Pet. at 19. This is a contrived question having no relation to this case.

Petitioner cites to a single sentence in the decision below for his claim that the California Supreme Court has "extinguish[ed] the Fifth Amendment rights of citizens who purchase regulated property." *Id.* The court held nothing remotely like that. Rather, the court merely held that prior knowledge was one factor in assessing the impact on his "investment-backed expectations." Pet.

App. at A-18. That holding is fully in accord with those of this Court. *See Lucas*, 505 U.S. at 1003; *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

The Takings Clause protects against "interfer[ence] with distinct investment-backed expectations." *Penn Central*, 438 U.S. at 124. The extent of those expectations is determined by "existing rules or understandings that stem from an independent source such as state law." *Lucas*, 505 U.S. at 1028. Thus, it is relevant to any analysis of economic impact on Petitioner's interests that the law he challenges had been in place for nearly a decade when he acquired the property. This is all the California Supreme Court said, and all it needed to say because the law's impact on Petitioner, however measured, was "not significant." Pet. App. at A-18.

The court below could have gone further and held, as this Court suggested in *Lucas*, 505 U.S. at 1030, that the pre-existing use restrictions on Petitioner's property inhered in his title "under relevant property" law; therefore, he could not resort to the Takings Clause when Respondent enforced those restrictions. *Id.* at 1031.[11] But, contrary to Petitioner's assertion, the California Supreme Court did not dismiss his takings claim on this ground. It merely stated that he could not claim frustration of expectations when, in fact, he expected a 12% annual

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[11] To the extent Petitioner complains of the enactment of the restrictions in the first place (nine years before he purchased), his claim is barred by the statute of limitations. *Azul Pacifico, Inc. v. City of Los Angeles*, 948 F.2d 575, 587 (9th Cir. 1991).

limit on rent increases. As noted in *Lucas*, application of "existing rules or understandings is surely unexceptional." *Id.*

CONCLUSION

The decision below applies well-settled doctrine under the Takings Clause. It is perfectly consistent with decisions of this Court and other courts. It does not raise recurring issues of national dimension. Accordingly, Petitioner has manifestly failed to demonstrate that certiorari is warranted. SUP. CT. R. 10.1.

For the foregoing reasons, Respondent respectfully requests that the Petition for Certiorari be denied.

Respectfully submitted,

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APPENDIX

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SUPERIOR COURT FOR THE STATE OF CALIFORNIA
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WEST DISTRICT

EARL KAVANAU, Petitioner, v. SANTA MONICA RENT CONTROL BOARD, an Agency of the City of Santa Monica, Respondent.	CASE NO. SS 000 440 FIRST AMENDED PETITION FOR WRIT OF ADMINISTRATIVE MANDATE [CCP SECTION 1094.5] (Filed Dec. 12, 1990)
VIRDELMA GIVAN, SANDRA JEAN MAJD, RUSSELL KIZIOR, PHILIP HIMBERG, JIM BALLANTINE, PEGGY COGGESHALL, LAURIE MONLOUP, THEODORE KIRSCHNER, ROBERT VENEGAS, AMY SHERWOOD, AND ROBERT SHERWOOD, Real Parties in Interest.	

Petitioner Earl W. Kavanau (hereinafter referred to as "Petitioner") petitions this court for a Writ of Administrative Mandate under California Code of Civil Procedure Section 1094.5 directed to Respondent Santa Monica Rent Control Board, an agency of the City of Santa Monica (hereinafter referred to as "Respondent Agency"), and by this verified petition represents that:

1. Petitioner is now, and at all times relevant herein, has been the owner of the real property known by street address as 818 5th Street, Santa Monica, Los Angeles County, California (hereinafter referred to as "Property"). Property consists of ten residential rental units and is subject to the restrictions of Article XVIII of the Charter of the City of Santa Monica, commonly referred to as the Rent Control Charter Amendment.

2. Respondent Agency is now, and at all times relevant herein, has been the agency charged with administering the provisions of the Rent Control Charter Amendment.

3. Real Parties in Interest are now, and at all times relevant herein, have been tenants residing at the property.

4. On or about November 30, 1989, Petitioner filed with the Respondent Agency a petition for an individual rent adjustment, Petition Number I-1093, seeking increases in the maximum allowable rents for the rental units located on the Property.

5. On December 21, 1989, January 6, 1990 and January 27, 1990 the Respondent Agency's Hearing Examiner held evidentiary hearings to determine whether the Petitioner was entitled to rent increases. Petitioner presented

evidence, both oral and written, of repair and maintenance, of bids and estimates for work to be done in the future, and of expenditures of time and money spent by Petitioner at and on the property.

6. On or about April 17, 1990 the hearing examiner issued a written decision which granted Petitioner increases based on the application of the MNOI formula and proposed and completed capital improvements. The Petitioner was denied increases for other proven expenditures; the Petitioner's increases were capped at twelve percent per year despite the fact that the MNOI formula determined that Petitioner was entitled to an increase higher than 12% in order to achieve a fair return; and Petitioner was denied the ability to take advantage of the annual general adjustments for a period of seven (7) years.

7. On or about April 26, 1990 the Petitioner timely appealed the decision of the Hearing Examiner on the grounds that the decision of the Hearing Examiner was not supported by the evidence, was an abuse of the Hearing Examiner's discretion, and denied the Petitioner a fair return.

8. On May 24, 1990 the Respondent Agency considered Petitioner's appeal and despite minor revisions to the decision the Respondent Agency voted to uphold the decision of the Hearing Examiner.

9. Petitioner has now exhausted all of the administrative remedies available to him.

10. In making its decision the Respondent Agency exceeded its jurisdiction, failed to proceed in the manner

required by law, acted arbitrarily and capriciously and abused its discretion in the following respects:

a. The Respondent Agency's decision to prevent Petitioner from realizing the full rental increase which he is entitled to under the Respondent Agency's MNOI formula, denies Petitioner a just and reasonable return, constitutes a taking of Petitioner's property without just compensation, and denies Petitioner due process under the California and United States Constitutions.

b. The Respondent Agency's order that Petitioner not partake of the annual general adjustment for a period of 7 years, denies Petitioner a just and reasonable return, constitutes a taking of Petitioner's property without just compensation, and denies Petitioner due process under the California and United States Constitutions.

c. The Respondent Agency erroneously failed to include all property tax expenses paid by Petitioner in the current year.

d. The Respondent Agency erroneously combined certain repair and maintenance items and considered them capital improvements.

Wherefore, Petitioner prays for judgment as follows:

1. That this court issue a writ of mandate compelling Respondent to vacate and set aside its prior decision and compelling Respondent (1) to allow Petitioner to take the full rent increase that he is entitled to as determined by the MNOI procedure, said increase to be effective as of May 24, 1990, (2) to take into account the entire real property tax expense experienced by Petitioner in the current year, and (3) to correctly treat certain expenses as

repair and maintenance items as opposed to capital improvements;

2. For attorneys' fees pursuant to Code of Civil Procedure Section 1021.5 and Government Code Section 800;

3. For Petitioner's costs of suit; and

4. For such other and further relief as the court deems just and proper.

DATED: December 9, 1990.

/s/ Craig Mordoh
CRAIG MORDOH, ESQ.
Attorney for Petitioner